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Supreme Court of the United States

OCTOBER TERM, 1994

THE SHERWIN-WILLIAMS COMPANY,

Petitioner,

v.

EASTERN MOUNTAIN PLATFORM TENNIS, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under the Federal Rules of Civil Procedure, a losing party may appeal from the denial of summary judgment on a question of law without also raising the issue at the close of evidence in a motion for judgment as a matter of law under Rule 50.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the court of appeals were plaintiff-appellant/cross-appellee Eastern Mountain Platform Tennis, Inc. and defendant-appellee/cross-appellant The Sherwin-Williams Company.

An additional plaintiff in the district court was Thomas T. Rogers. The district court granted Sherwin-Williams' motion to dismiss Rogers as a plaintiff prior to trial.

Pursuant to Supreme Court Rule 29.1, Sherwin-Williams hereby states that it has no parent companies, subsidiaries, or affiliates which have issued shares to the public.

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THE SHERWIN-WILLIAMS COMPANY,

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EASTERN MOUNTAIN PLATFORM TENNIS, INC.,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

The Sherwin-Williams Company ("Sherwin-Williams") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 40 F.3d 492. It is reprinted at pages 1a-20a of the appendix to this petition. The Order of the court of appeals denying Petitioner's Motion for Rehearing and Request to Certify Question of Law is unreported. It is reprinted at page 21a of the appendix to this petition. The relevant orders of the district court are unreported. These decisions are reprinted at pages 22a-25a of the appendix to this petition.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 1994. A timely petition for rehearing and request to certify question of law was denied on January 6, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Federal Rule of Civil Procedure 50(a) provides:

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to judgment.

Federal Rule of Civil Procedure 56 provides, in pertinent part:

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

STATEMENT

This case presents a question that has divided the courts of appeals: whether a Rule 50 motion for judgment is a necessary predicate for appellate review of a denied summary judgment motion which turns on an issue of law.

Respondent, Eastern Mountain Platform Tennis, Inc. ("EMPT"), a New Hampshire corporation, filed this diversity suit against The Sherwin-Williams Company ("Sherwin-Williams"), an Ohio corporation, in the United States District Court for the District of New Hampshire. The case involves EMPT's purchase of commercial paint coatings from Sherwin-Williams, which EMPT used in the manufacture and maintenance of aluminum platform tennis courts. App. 2a n.1.

EMPT claimed that because the paint systems did not perform as expected, Sherwin-Williams did not perform the contract. EMPT then filed this suit against Sherwin-Williams.[1] One of the

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[1] EMPT's president and sole shareholder, Thomas T. Rogers, was originally a co-plaintiff along with EMPT. The district court dismissed Rogers on Sherwin-Williams' motion, because the only causes of action belonged to EMPT, the purchaser of the paint coatings.

counts in EMPT's complaint alleged that Sherwin-Williams had violated the New Hampshire Consumer Protection Act ("NHCPA"), N.H. Rev. Stat. Ann. § 358-A:2 (II), (V), and (VII) (1984), by selling the allegedly defective paint coatings to EMPT. App. 3a.[2]

The NHCPA is a consumer protection statute which expressly creates two causes of action: one for claims of unfair methods of competition and the other for unfair or deceptive acts or practices. Specifically, N.H. Rev. Stat. Ann. § 358-A:2 makes it unlawful for "any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state." Under N.H. Rev. Stat. Ann. § 358-A:10 (1984),[3] a finding that a defendant's violation

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[2] Section 358-A:2 reads in pertinent part:

> **358-A:2 Acts Unlawful.** It shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state. Such unfair method of competition or unfair or deceptive act or practice shall include, but is not limited to, the following:
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> * * * *
>
> II. Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
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> * * * *
>
> V. Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;
>
> * * * *
>
> VII. Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another. . . .

[3] Section 358-A:10, as it existed prior to 1994, reads in pertinent part:

> **358-A:10 Private Actions.**

of the NHCPA was "willful or knowing" makes the defendant potentially subject to multiple damages. Although the New Hampshire Supreme Court has not definitely resolved the issue, several lower New Hampshire courts have held that the NHCPA does not apply to commercial transactions between two businesses. *See Portable Computing Int'l Corp. v. IDG Communications/Peterborough, Inc.*, No. 90-E-00247 (Hillsborough Cty. Sup. Ct. Aug. 27, 1993); *Thermal Dynamics Corp. v. McGrath*, No. 88-C-157 (Grafton Cty. Sup. Ct. May 4, 1989). *But see A&B Electronics Co., Inc. v. Permagile Industries Inc.*, No. 91-C-107 (Coos Cty. Sup. Ct. Jan. 15, 1993).

Prior to trial, Sherwin-Williams moved for summary judgment on EMPT's Consumer Protection Act claim. App. 3a. The principal question presented by Sherwin-Williams' motion was, as

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I. Any person injured by another's use of any method, act or practice declared unlawful under this chapter may bring an action for damages and for such equitable relief, including an injunction, as the court deems necessary and proper: If the court finds for the plaintiff, recovery shall be in the amount of actual damages or $200, whichever is greater. If the court finds that the use of the method of competition or the act or practice was a willful or knowing violation of this chapter, it shall award as much as 3 times, but not less than 2 times, such amount. In addition, a prevailing plaintiff shall be awarded the costs of the suit and reasonable attorney's fees, as determined by the court. Any attempted waiver of the right to the damages set forth in this paragraph shall be void and unenforceable. Injunctive relief shall be available to find individuals under this chapter without bond, subject to the discretion of the court.

II. Upon commencement of any action brought under this section, the clerk of the court shall mail a copy of the complaint or other initial pleadings to the attorney general and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the attorney general.

In 1994, the $200 floor in paragraph (I) was increased to $1,000. In all other respects this section remains unchanged.

Sherwin-Williams' supporting brief argued, that "New Hampshire's Consumer Protection Act, RSA Ch. 358-A, does not apply to commercial transactions between businesses." On January 5, 1993, the day before trial began, the district court denied Sherwin-Williams' motion, holding that the NHCPA applies, as a matter of law, to "a transaction between two businesses." As the district court noted, no factual question was presented by Sherwin-Williams' motion, only a legal one: "Instantly there is no dispute that both parties are businesses." App. 22a-23a.

A jury trial resulted in a verdict of $1,087,000 for plaintiff. App. 3a. According to the special verdict form, the jury found that Sherwin-Williams' sale of the paint coatings had violated an express warranty, an implied warranty of fitness for a particular purpose, and the NHCPA. *Id.* The jury also found that Sherwin-Williams' violation of the NHCPA had been willful or knowing. *Id.*

Because the jury found that the NHCPA had been willfully or knowingly violated, the district judge was required under Section 10 of that Act, N.H. Rev. Stat. Ann. § 358-A:10, to at least double the actual damages found by the jury. Exercising the authority granted to him under the NHCPA, the district judge on June 1, 1993, doubled the jury's $1.087 million actual damages award: "[P]ursuant to the Consumer Protection Act, the jury's award of $1,087,000 is hereby DOUBLED and JUDGMENT IS ENTERED in favor of the plaintiff for a total of $2,174,000." App. 24a. Also pursuant to Section 10 of the NHCPA, the district judge awarded EMPT $111,280.27 in attorneys' fees. App. 25a.

Sherwin-Williams appealed to the United States Court of Appeals for the First Circuit. The principal issue raised in its brief to the court of appeals was the district court's legal ruling on Sherwin-Williams' pretrial motion for summary judgment, which held the NHCPA applicable to commercial transactions between two businesses. EMPT's responding brief answered this argument on its merits, arguing that the NHCPA did apply to transactions between businesses, principally because the term

"person" as used in the NHCPA should include "corporations." But nowhere in EMPT's appeal briefs did it argue that Sherwin-Williams had waived this issue by not re-raising it in a post-trial motion.

The court of appeals affirmed the district court's judgment in almost all respects (the lone exception being Sherwin-Williams' challenge to the calculation of prejudgment interest). App. 20a. The court of appeals held that Sherwin-Williams had waived its argument that the NHCPA does not apply to commercial transactions between businesses by failing to re-raise it in a motion for judgment as a matter of law under Fed. R. Civ. P. 50. To the court of appeals, the filing of Sherwin-Williams' law-based motion for summary judgment was not enough to save the point; instead, Sherwin-Williams should have somehow "perfected" this legal point for appeal "by making a motion for judgment as a matter of law at the close of the evidence." App. 4a. In total, the court of appeals' discussion of this question—which was supported by citations to three cases from other circuits—was as follows:

> The Appellant has failed to preserve this point for review on appeal. The *denial* of a motion for summary judgment does not merge into the final judgment. *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1573 (Fed. Cir. 1986). Such a denial, to be preserved for review of a legal conclusion subsumed in the ruling, must be perfected by making a motion for judgment as a matter of law at the close of the evidence. *Watson v. Amedco Steel, Inc.*, 29 F.3d 274, 279 (7th Cir. 1994); *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1251 (10th Cir. 1992); *see Lama v. Borras*, 16 F.3d 473 (1st Cir. 1994). The denial of this latter motion does merge into the judgment, and all rulings of law subsumed within it are subject to review on appeal from the judgment.
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> Here, Appellant failed to make any motion for judgment as a matter of law at the close of all the evidence. Accordingly, the determination, as a matter of law, by the trial judge in ruling on the summary judgment motion that the CPA applied

> to business transactions never merged into the judgment and is not available for review on this appeal.

App. 4a-5a. The court of appeals nonetheless proceeded to engage in a review of Sherwin-Williams' argument—not *de novo* review, as the court asserted it was giving (App. 5a), and as would ordinarily be proper, but only for plain error, which it called "manifest error." Of course, unlike *de novo* review, plain error review of a legal question in the courts of appeals is not nearly as searching as *de novo* review, *see Polk v. Ford Motor Co.*, 529 F.2d 259, 269 (8th Cir.), *cert. denied*, 426 U.S. 907 (1976), and this Court has itself suggested that review for "plain error" involves giving substantial deference to the lower court's construction of the state statute. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985); *Palmer v. Hoffman*, 318 U.S. 109, 118 (1943).

The extremely limited nature of this review was borne out by the court of appeals opinion's failure to address a very recent New Hampshire Supreme Court case which supported Sherwin-Williams' argument, *Roberts v. General Motors Corp.*, 643 A.2d 956 (N.H. 1994). *Roberts* held that the NHCPA did not apply to the type of transaction at issue—the denial of an auto dealership franchise to a prospective franchisee by an automobile manufacturer. In the course of its decision, the New Hampshire Supreme Court noted that the acts and practices proscribed by the NHCPA were those which dealt "with transactions for the provision of goods or services *to consumers*." *Id.* at 960 (emphasis added).[4]

In light of the court of appeals' omission of any discussion of *Roberts v. General Motors Corp.*, among other things, Sherwin-Williams petitioned the court of appeals for rehearing, and suggested that the question of the NHCPA's applicability to

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[4] *Roberts* was decided the day of oral argument in the First Circuit, and was immediately thereafter supplied to the panel hearing the appeal pursuant to Fed. R. App. P. 28(j).

commercial transactions could be certified to the New Hampshire Supreme Court. That petition for rehearing and certification was denied without opinion on January 6, 1995. App. 21a.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with applicable decisions of the Second, Seventh, and Eleventh Circuits, although it is supported by decisions of the Sixth and Federal Circuits.

The First Circuit held that Sherwin-Williams waived its principal argument under the New Hampshire Consumer Protection Act by failing to re-raise that pure question of law in a motion for judgment as a matter of law (JMOL) under Fed. R. Civ. P. 50(a).

The general rule, of course, is that an appeal from a final judgment brings up all of the non-final orders and rulings which could not be reviewed prior to a final judgment. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375 (1987); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981); *Caldwell v. Moore*, 968 F.2d 595, 598 (6th Cir. 1992) (denial of request for leave to file an amended complaint appealable after entry of a final judgment, "because the final judgment calls into question the propriety of all the nonfinal rulings of the district court").[5] Most of the courts of appeals have recognized an exception to this general rule and have declined to review pretrial summary judgment motions which were denied on the basis of disputed factual issues. The theory behind this limited exception is that time and circumstances have

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[5] "The prohibition against immediate appeal of most pretrial and trial orders established by the final judgment rule is offset by the rule that once appeal is taken from a truly final judgment that ends the litigation, earlier rulings generally can be reviewed. The price to be paid for the final judgment requirement would be high indeed if the rule were otherwise." 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3905.1, at 249 (2d ed. 1992) (footnote omitted).

passed the pretrial motion by: "Since the record at trial may be different, such a preliminary ruling does not determine what issues should be submitted to the jury." *Kutner Buick, Inc. v. American Motors Corp.*, 868 F.2d 614, 619 (3d Cir. 1989). *See also Switzerland Cheese Ass'n, Inc. v. E. Horne's Market*, 385 U.S. 23, 25 (1966); *Jarrett v. Epperly*, 896 F.2d 1013, 1016 (6th Cir. 1990).

But when the denied summary judgment motion turns on a question of law—as here—there is a clear and pervasive conflict among the circuits. This important and recurring question of federal civil and appellate procedure, on which the circuits are hopelessly divided, should be resolved by this Court at this time so that litigants in all of the federal circuits are subject to a clear and uniform rule.

I. THE DECISION BELOW SQUARELY CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS.

The court of appeals in this case adopted a rule that summary judgment motions which turn solely on a question of law must be re-argued in a motion for JMOL at the close of evidence. *See* Fed. R. Civ. P. 50(a). The First Circuit's decision in this regard expressly conflicts with applicable precedent of the Second Circuit, *Savarin Corp. v. National Bank of Pakistan*, 447 F.2d 727 (2d Cir. 1971), the Seventh Circuit, *Trustees of Indiana University v. Aetna Casualty & Surety Co.*, 920 F.2d 429 (7th Cir. 1990), and the Eleventh Circuit, *Holley v. Northrop Worldwide Aircraft Services, Inc.*, 835 F.2d 1375 (11th Cir. 1988), and is at odds with some cases—but not others—from the Fifth, Ninth and Tenth Circuits. The court of appeals' decision is supported, however, by cases from the Sixth and Federal Circuits. Certiorari should be granted to resolve this conflict.

The First Circuit's judgment conflicts with the decision of the Second Circuit in *Savarin Corp. v. National Bank of Pakistan.* There, a grain exporter (Savarin) sued the National Bank of Pakistan (Bank) and another over a dispute involving a contract for the shipment of wheat and letters of credit. Before trial, the

Bank moved for summary judgment as a matter of law on the claims asserted against it. On the claims alleging breaches of the contract and letters of credit, the Bank argued that its construction of those documents—each "a matter of law"—should be adopted. The court denied summary judgment, suggesting that a trial might "bring into sharper focus" the legal question. 290 F. Supp. 285, 288, 290 (S.D.N.Y. 1968).

After a jury trial, the Bank was found liable and it appealed. On appeal, the Second Circuit saw the case as involving "a factual situation virtually undisputed," 447 F.2d at 728, and reviewed the legal questions of the construction of the contract and the letters of credit. Although it sided with Savarin's construction of these documents, the Second Circuit concluded that the Bank's denied summary judgment motion properly placed those legal questions before the court, and held that "[t]he motion for summary judgment was properly denied." *Id.* at 732.[6]

The court of appeals' judgment also conflicts with applicable decisions of the Seventh Circuit. In *Trustees of Indiana University v. Aetna Casualty & Surety Co.*, Indiana University (I.U.) appealed, after a jury trial, from the denial of its summary judgment motion, which involved the applicability of a contract term to the dispute at issue (a legal issue). The Seventh Circuit held, over Aetna's objection, that the denial of I.U.'s law-based summary judgment motion was properly appealable because "'[a]s with other interlocutory orders that arise during the course of a case, denials of summary judgment are merged into a final

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[6] Other Second Circuit cases similarly confirm that the principal reason summary judgment denials are not *immediately* appealable when they occur is because such denials are appealable from a final judgment. *See State of New York v. Nuclear Regulatory Comm'n*, 550 F.2d 745, 759 (2d Cir. 1977) (citing cases) ("an order denying a motion for summary judgment is not a 'final decision' . . . and such an order is therefore ordinarily not reviewable *until a final judgment has been rendered in the case.*") (emphasis added).

judgment and then may be appealed.'" 920 F.2d at 433 (citations omitted).

Trustees, like this case, dealt with a summary judgment motion denied on *legal* grounds, and its holding would have allowed Sherwin-Williams' denied summary judgment motion to be reviewed, had the appeal taken place in the Seventh Circuit.[7] *See also EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 353 & n.55 (7th Cir. 1988).

The First Circuit's decision is also in conflict with the rule adopted by the Eleventh Circuit. In *Holley v. Northrop World-wide Aircraft Services, Inc.*, the Eleventh Circuit held that denied, law-based summary judgment motions should be reviewable after final judgment. 835 F.2d at 1377-78. The Eleventh Circuit noted that some courts of appeals disagree with this approach and had "gone so far as to refuse appeals on all motions for summary judgment" which were raised on appeal after a trial. *Id.* at 1378 n.7 (citing *Boyles Galvanizing and Plating Co. v. Hartford Accident and Indemnity Co.*, 372 F.2d 310 (10th Cir. 1967) and *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564 (Fed. Cir. 1986), *cert. dismissed*, 479 U.S. 1072 (1987)). The Eleventh Circuit noted that its rule did not "go[] so far" as those two cases, but was a narrower and simpler one: "We hold only that a party may not rely on the undeveloped state of the facts at the time he moves

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[7] In a later case involving an attempt to resurrect a summary judgment motion denied on *factual* grounds after a full trial, the Seventh Circuit, in a case circulated to all of its active judges before filing, "disavow[ed]" *Trustees*, but only "[t]o the extent [that it] suggests that a denial of summary judgment may *always* be reviewed after a trial in which the same issue is presented." *Watson v. Amedco Steel, Inc.*, 29 F.3d 274, 278 (7th Cir. 1994) (emphasis added). Although the First Circuit relied on *Watson* in holding Sherwin-Williams' argument waived, it is clear in light of *Trustees* that the rationale of *Watson* applies only to record-based summary judgment motions denied because of disputed issues of fact. *Id.* at 277 (quoting *Switzerland Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 25 (1966)).

for summary judgment to undermine a fully-developed set of trial facts which militate against his case." 835 F.2d at 1378.[8]

The First Circuit's rule is apparently supported by case law from the Sixth and Federal Circuits, although those courts' blanket prohibitions on appellate review arose in the contexts of fact-based summary judgment motions.

The Sixth Circuit, in *Jarrett v. Epperly*, announced a *per se* rule that "where summary judgment is denied and the movant subsequently loses after a full trial on the merits, the denial of summary judgment may not be appealed." 896 F.2d at 1016. The Sixth Circuit noted that *Jarrett* presented this as "an issue of first impression in this Circuit," and opined that the "better rule" was the blanket prohibition on appellate review that "appears to have been recently adopted by the Ninth and Federal Circuits." *Id. See also Summit Petroleum Corp. of Ind. v. Ingersoll-Rand Financial Corp.*, 909 F.2d 862, 865 n.4 (6th Cir. 1990) (declining appellate review of denied summary judgment motion after a bench trial under Fed. R. Civ. P. 52(a); unclear from opinion whether summary judgment motion based on law or fact).

Similarly, in another case involving a fact-based denial of summary judgment, the Federal Circuit in *Glaros v. H.H. Robertson Co.*, announced the blanket rule that "a denial of summary judgment is not properly reviewable on an appeal from the final judgment entered after trial." 797 F.2d at 1573. In the course of its opinion, the Federal Circuit expressly disagreed with the Second Circuit's opinion in *Savarin*, and pronounced its blanket prohibition on appellate review as "the general and better view." *See id.* at 1573 n.14. *See also Senza-Gel Corp. v.*

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[8] Because Northrop conceded that its fact-based motion was superseded by the facts presented at trial, its motion was held not appealable under the Eleventh Circuit's rule. *See also Stuckey v. Northern Propane Gas Co.*, 874 F.2d 1563, 1567 (11th Cir. 1989) (applying the *Holley* rule to deny review of a factually based summary judgment motion).

Seiffhart, 803 F.2d 661, 669 (Fed. Cir. 1986) (fact-based motion).

The case law of at least three other circuits—the Fifth, Ninth, and Tenth—is internally inconsistent on this point.

In *Satcher v. Honda Motor Co.*, 984 F.2d 135 (5th Cir. 1993), a panel of the Fifth Circuit adopted the rule rejected by the First Circuit in this case. In a product liability action tried under Mississippi law, Honda moved for summary judgment on the ground that Satcher, as a matter of law, was barred from pursuing his case by Mississippi's "open and obvious" doctrine. The court there held that an appeal from a final judgment places before the appellate court each of the adverse, non-final rulings which shaped that judgment. Thus, an appeal from a final judgment entered after a trial on the merits brings up for review a denial of summary judgment which ruled, as a matter of law, that plaintiff had a viable claim. *Id.* at 137-38. Even with the benefit of a full trial record, the Fifth Circuit was still able to conclude: "This case should never have gone to trial." *Id.* at 138.

The Fifth Circuit's ruling in *Satcher* was in accord with prior Fifth Circuit precedent which had stated that a party who has made a summary judgment motion "may obtain review of prejudicial adverse interlocutory rulings upon his appeal from adverse final judgment." *Dickinson v. Auto Center Mfg. Co.*, 733 F.2d 1092, 1102 (5th Cir. 1983).

Satcher, however, was vacated because of an intervening legislative development in Mississippi state law. *See* 993 F.2d 56 (5th Cir. 1993). And subsequent Fifth Circuit cases appear to have adopted the contrary, blanket rule adopted by the First Circuit here, and seemingly adopted by the Sixth and Federal Circuits (*see supra*). In a case involving an attempted post-judgment appeal of a summary judgment motion denied on factual grounds—apparently held that *all* denied summary judgment motions are unreviewable on appeal from a final judgment. *See Black v. J.I. Case Co., Inc.*, 22 F.3d 568, 570-71 (5th Cir.), *cert. denied*, 115 S.Ct. 579 (1994). In another fact-based case, *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379,

1381 n.6 (5th Cir. 1994), *cert. denied*. 115 S.Ct. 779 (1995), the Fifth Circuit declined appellate review and expressly rejected the *Savarin* approach taken by the Second Circuit.

The Ninth Circuit's case law is also internally conflicted. In *Lum v. City and County of Honolulu*, 963 F.2d 1167 (9th Cir.), *cert. denied*, 113 S.Ct. 659 (1992), the Ninth Circuit in a fact-based case appears to have announced the blanket rule that "there is no need to review denials of summary judgement [*sic*] after there has been a trial on the merits. Such a review is a pointless academic exercise." *Id.* at 1170. *See also Locricchio v. Legal Services Corp.*, 833 F.2d 1352, 1358-59 (9th Cir. 1987) (fact-based motion). But in *Wilson Arlington Co. v. Prudential Ins. Co.*, 912 F.2d 366 (9th Cir. 1990), the Ninth Circuit, speaking through Judge Kozinski, reviewed, after an adverse jury verdict, a pure legal question—the construction of a contract—which had been presented in a pre-trial summary judgment motion (which had been denied because the district court erroneously looked to parol evidence to find disputed fact issues).

The Tenth Circuit, too, has developed a body of case law which is internally inconsistent on this point. In one of the earlier cases to have addressed the issue, the Tenth Circuit held that the denial of a fact-based summary judgment motion was not appealable, since the factual issues involved in the summary judgment motion had been fully litigated. *Boyles Galvanizing & Plating Co. v. Hartford Accident & Indemnity Co.*, 372 F.2d at 312. However, a later Tenth Circuit panel took pains to allow an appellant to appeal a purely legal issue—standing to bring suit under Rule 10b-5—that had been raised in its denied summary judgment motion and not properly re-raised thereafter. *Grubb v. FDIC*, 868 F.2d 1151, 1160 (10th Cir. 1989). Even more recently, another Tenth Circuit panel apparently found that the 1967 decision in *Boyles* announced a broader rule, stating that "[t]his court has held that denial of a motion for summary

judgment is not appealable" after a trial. *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1250 (10th Cir. 1992).[9]

The decisions declining to review denials of summary judgment find no support in the language of either Rule 56 or Rule 50 of the Federal Rules of Civil Procedure, neither of which suggests that a legal issue raised on summary judgment must be renewed after trial. The court of appeals' imposition of a JMOL requirement is indeed contrary to the purpose of Rule 50. As stated by the Advisory Committee's Notes to the 1991 amendment to Rule 50, the purpose of a JMOL motion "is to assure the responding party an opportunity to cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment." But where, as here, the "deficiency" is one of law and not fact, no "proof," overlooked or otherwise, can "cure" it.

In their widely followed treatise on federal procedure, Professors Wright, Miller and Cooper have agreed that where the summary judgment motion involves a pure question of law—and as a consequence the summary judgment record and the trial record are "essentially identical" on the disputed point—post-judgment appellate review of the summary judgment ruling should be available. 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3905.1, at 259-60 n.28 (2d ed. 1992). *See also* 10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2715, at 636-38 (2d ed. 1983). The opinions of these respected and influential scholars further underscore the anomalous nature of the court of appeals' decision in this case.

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[9] The *Whalen* panel attempted to distinguish *Grubb* as a case involving "standing, . . . a jurisdictional issue, [which] may be raised at any time," 974 F.2d at 1251 n.5, even though the panel in *Grubb* had not relied on any such reasoning in holding the denied summary judgment motion appealable.

II. THIS CASE PRESENTS AN IMPORTANT AND RECURRING ISSUE OF FEDERAL CIVIL AND APPELLATE PROCEDURE THAT SHOULD BE RESOLVED BY THIS COURT.

The question of whether a denied summary judgment motion which turns on an issue of law should be appealable from a final judgment is a question of great practical importance.

The question has arisen with considerable and increasing frequency in the past several years. Nearly every federal court of appeals has now confronted the question.[10] Indeed, most of the Circuits have addressed this issue only recently, since this Court's three influential 1986 summary judgment decisions. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Absent a decision by this Court resolving the conflict, the uncertain law in this area will continue to be a trap for the unwary, since there is no indication in any of the federal rules that a JMOL motion is a prerequisite to appealing a denied summary judgment motion on a pure legal issue.

Review is also appropriate to remove an unnecessary burden for the district courts. Under the First Circuit's rule, a litigant whose law-based summary judgment motion is denied must now

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[10] *Eastern Mountain Platform Tennis, Inc. v. The Sherwin-Williams Co.*, 40 F.3d 492 (1st Cir. 1994) (App. 1a-20a); *Savarin Corp. v. National Bank of Pakistan*, 447 F.2d 727 (2d Cir. 1971); *Kutner Buick, Inc. v. American Motors Corp.*, 868 F.2d 614 (3d Cir. 1989); *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379 (5th Cir. 1994); *Jarrett v. Epperly*, 896 F.2d 1013 (6th Cir. 1990); *Watson v. Amedco Steel Inc.*, 29 F.3d 274 (7th Cir. 1994); *Bottineau Farmers Elevator v. Woodward-Clyde Consultants*, 963 F.2d 1064 (8th Cir. 1992); *Locricchio v. Legal Services Corp.*, 833 F.2d 1352 (9th Cir. 1987); *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248 (10th Cir. 1992); *Holley v. Northrop Worldwide Aircraft Services Inc.*, 835 F.2d 1375 (11th Cir. 1988); *Glaros v. H. H. Robertson Co.*, 797 F.2d 1564 (Fed. Cir. 1986).

re-submit the same motion—this time labelled a JMOL motion—after trial. The district judge must then—a second time—rule on the same question, even though nothing has occurred in the interim which would cause the district court to alter its earlier ruling. Indeed, requiring re-argument would be completely useless, since it is hornbook law that a legal ruling on a summary judgment motion becomes "law of the case." 6 *Moore's Federal Practice* ¶ 56.20[3.-4], at 56-703 (1995). *See also* Fed. R. Civ. P. 56(d) (where summary judgment is in any respect denied, district court "shall thereupon make an order," upon which "the trial shall be conducted accordingly"). In essence, the First Circuit has imposed a requirement that a litigant make, and that the district court address, a motion for reconsideration prior to appealing a legal question. We are aware of no other area of federal procedure where a motion for reconsideration on a pure legal question is a necessary predicate to appellate review.[11] There is simply no reason, and no authority, for adding this inefficient and duplicative burden to the federal district courts', and the litigants', workloads. *Cf.* Fed. R. Civ. P. 1 (rule of construction of the Federal Rules is that they be interpreted "to secure the just, speedy, and inexpensive determination of every action").

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[11] While a denied motion *in limine* cannot be a ground for appeal in some circuits (an objection to admission of evidence being required), *see, e.g., Wilson v. Waggener*, 837 F.2d 220, 222 (5th Cir. 1988), the purpose of this rule—like the fact-based summary judgment rule—is to create an adequate factual record for appeal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 6, 1995

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 94-1044

EASTERN MOUNTAIN PLATFORM TENNIS, INC.,

Plaintiff, Appellant,

vs.

THE SHERWIN-WILLIAMS COMPANY, INC.,

Defendant, Appellee.

No. 94-1045

EASTERN MOUNTAIN PLATFORM TENNIS, INC.,

Plaintiff, Appellee,

vs.

THE SHERWIN-WILLIAMS COMPANY, INC.,

Defendant, Appellant.

APPEALS FROM THE UNITED STATES

DISTRICT COURT

FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Clarence C. Newcomer,* *Senior U.S. District Judge*]

Before TORRUELLA, Circuit Judge, CAMPBELL, Senior Circuit Judge, and CARTER,** District Judge.

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* Of the Eastern District of Pennsylvania, sitting by designation.

** Of the District of Maine, sitting by designation.

Ovide M. Lamontagne with whom George R. Moore and Devine, Millimet & Branch, P.A., Manchester, NH, were on brief, for The Sherwin-Williams Co.

Stephen S. Ostrach, Patrick W. Hanifin, Todd S. Brilliant and New England Legal Foundation, Boston, MA, were on brief, for Business and Industry Ass'n of New Hampshire, amicus curiae.

Kenneth G. Bouchard with whom Paul B. Kleinman and Bouchard & Mallory, P.A., Manchester, NH, were on brief, for Eastern Mountain Platform Tennis, Inc.

November 28, 1994

CARTER, *Chief District Judge*. This action arose from the sale of a paint system recommended by Defendant, The Sherwin-Williams Company ("Sherwin-Williams"), to Plaintiff, Eastern Mountain Platform Tennis, Inc. ("EMPT"), for use in producing platform tennis courts. Sherwin-Williams' representative David Shelley ("Shelley") recommended a paint system to EMPT after EMPT informed Shelley that it would not change products unless the new system met or exceeded the performance of the paint system it had used previously. The Sherwin-Williams system did not perform as well as the system it replaced. In fact, the courts covered with Sherwin-Williams paints began to show signs of wear, with the coating peeling away from the aluminum panels and the courts' surface becoming slick due to loss of aluminum oxide aggregate during the first season of use.[1] After a jury trial,

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[1] The painting of the tennis platform courts involves a six-step process and two types of paint. First, aluminum panels are washed with acid to eliminate grease and etch the surface. Second, the panels are sanded to increase the profile of the surface. Third, a layer of primer epoxy paint is applied. Fourth, aluminum oxide aggregate is pneumatically broadcast over the wet epoxy primer layer. Fifth, a topcoat of epoxy paint is applied. Sixth, aluminum oxide aggregate is pneumatically broadcast over the wet topcoat.

The paint system must have two important characteristics. First, the primer coat must adhere to the aluminum through extreme changes of

the jury entered a verdict in favor of EMPT in the amount of $1,087,000. The special verdict form indicated that the jury found that Sherwin-Williams had violated an express warranty, an implied warranty of fitness for a particular purpose, and the New Hampshire Consumer Protection Act ("CPA" or "the Act"). N.H. Rev. Stat. Ann. § 358-A (1993). In addition, the jury found that Sherwin-Williams had willfully or knowingly engaged in unfair or deceptive practices. Pursuant to Section 10 of the CPA, the trial judge doubled the jury verdict. N.H. Rev. Stat. Ann. § 358-A:10 (1993). In addition, the trial judge awarded prejudgment interest on the amount of the original jury verdict up to the date of entry of the final judgment. N.H. Rev. Stat. Ann. § 524:1-b (1993).

ISSUES ON APPEAL

Sherwin-Williams raises a number of issues on appeal. First, it challenges the trial judge's denial of summary judgment on the CPA claim contending that the CPA does not apply to purely commercial transactions (*i.e.*, transactions that do not involve sales to ultimate consumers). Second, Sherwin-Williams argues that, if the CPA does govern purely commercial transactions, the trial judge nevertheless erred in denying its motion for summary judgment on the CPA claim because the undisputed facts did not establish a violation of the Act.

Third, Sherwin-Williams argues that the trial judge erred in denying its motion to set aside the verdict on the CPA claim because the issue should not have been presented to the jury and because it was impossible to determine what portion, if any, of the award was the result of the CPA violation. Fourth, Sherwin-Williams contends that the judge erred in failing to give the jury instructions on "plaintiff's misconduct" or comparative

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temperature because the game is played outdoors on a year-round basis with a heater installed under the platform to melt snow and ice. Second, both the primer coat and the topcoat must have the capacity to hold aluminum oxide aggregate to insure a gritty nonslip surface for platform tennis players.

fault. Fifth, Sherwin-Williams seeks a new trial, or remittitur, on the basis that the damages awarded were speculative. Sixth, Sherwin-Williams asserts that the trial judge's conduct during the trial requires a new trial. Finally, Sherwin-Williams challenges the calculation of the award of prejudgment interest on the grounds that such interest is available only to the date of the jury verdict, rather than to the date of entry of final judgment. It further contends that it was error to award prejudgment interest on the portion of the verdict which represented an award of future lost profits.

On cross-appeal, EMPT argues that the trial judge erred in awarding prejudgment interest only on the original jury verdict and not on the entire amount of the judgment, including the doubled verdict under the CPA.

We will address, in turn, each of these contentions.

DISCUSSION

I. Application of the New Hampshire Consumer Protection Act to the Purely Commercial Transaction.

The Appellant has failed to preserve this point for review on appeal. The *denial* of a motion for summary judgment does not merge into the final judgment. *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1573 (Fed. Cir. 1986). Such a denial, to be preserved for review of a legal conclusion subsumed in the ruling, must be perfected by making a motion for judgment as a matter of law at the close of the evidence. *Watson v. Amedco Steel, Inc.*, 29 F.3d 274, 279 (7th Cir. 1994); *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1251 (10th Cir. 1992); *see Lama v. Borras*, 16 F.3d 473 (1st Cir. 1994). The denial of this latter motion does merge into the judgment, and all rulings of law subsumed within it are subject to review on appeal from the judgment.

Here, Appellant failed to make any motion for judgment as a matter of law at the close of all the evidence. Accordingly, the determination, as a matter of law, by the trial judge in ruling on the summary judgment motion that the CPA applied to business

transactions never merged into the judgment and is not available for review on this appeal.

Even though the issue of statutory construction was not preserved for appeal, we have nevertheless reviewed the record and are satisfied that, in determining the legal question as to whether the CPA applied to the type of transaction disclosed by the evidence in this case, the trial judge committed no "manifest error." The appeal on this point raises a question of statutory construction. In short, Sherwin-Williams argues that the Consumer Protection Act was intended to redress the discrepancies between a knowledgeable commercial seller and a consumer who is placed in the position of relying on the representations of that seller. The provisions of the Act, Sherwin-Williams argues, have no application where, as here, a commercial buyer acquires a product for use in the manufacture of another product in which its expertise may easily be greater than that of the seller. On amicus brief, the Business and Industry Association of New Hampshire agrees. Because the issue raised is an issue of law, our review is de novo.

We begin, and could easily conclude, our assessment of this argument by considering the plain meaning of the words of the statute. *Town of Wolfeboro v. Smith*, 556 A.2d 755, 756-57 (N.H. 1989). We must glean the intention of the legislature as to the scope of the Act "from its construction as a whole, not by examining isolated words and phrases." *Petition of Jane Doe*, 564 A.2d 433, 438 (1989). A thorough reading of the entire statute provides no direct support for Sherwin-Williams' contention that the Act applies only to transactions with ultimate consumers. The unfair and deceptive practices prohibited by the CPA appear to include transactions between business competitors as well as those involving ultimate consumers. N.H. Rev. Stat. Ann. 358-A:2 (1993). There are no provisions which limit the Act's protection to ultimate "consumers" alone. Indeed, there is no definition of a consumer, a consumer good, or a consumer transaction, although such definitions would be critical if the Act were intended to be limited in the way that Sherwin-Williams suggests. Moreover, the statute specifies "exempt transactions"

and does not include among them the kind of "commercial transactions" the defendant would delete from the purview of the statutory provisions. N.H. Rev. Stat. Ann. 358-A:3 (1993).

With this overview of the statute, we now turn to the specific provisions that EMPT contends make Sherwin-Williams' acts unlawful, and provide EMPT with a right of action. Here, the statute declares that "[i]t shall be unlawful for *any person* to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of *any trade or commerce* within this state." N.H. Rev. Stat. Ann. 358-A:2 (1993) (emphasis added).[2] Section 10 of the statute provides a private right of action as follows:

I. *Any person* injured by another's use of any method, act or practice declared unlawful under this chapter may bring an action for damages and for such equitable relief, including an

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[2] The statute defines a "person" and "trade or commerce" broadly:

I. "Person" shall include, where applicable, natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity.

II. "Trade" and "commerce" shall include the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this state.

N.H. Rev. Stat. Ann. 358-A:1 (1993). Sherwin-Williams' contention that the "where applicable" language in the definition of person creates ambiguity as to whether the act applies to commercial transactions is unconvincing. The language is not surplusage because section 6 of the Act provides different penalties for natural persons and all other persons. The relevant portions of the statute in this action specifically override any restriction on the term "person" by providing that "any person" may be guilty of unlawful or deceptive practices under section 2, and that "any person" has a private right of action for damages under section 10 (emphasis added).

> injunction, as the court deems necessary and proper. If the court finds for the plaintiff, recovery shall be in the amount of actual damages or $200, whichever is greater. If the court finds that the use of the method of competition or the act or practice was a willful or knowing violation of this chapter, it shall award as much as 3 times, but not less than 2 times, such amount. In addition, a prevailing plaintiff shall be awarded the costs of the suit and reasonable attorney's fees, as determined by the court. Any attempted waiver of the right to the damages set forth in this paragraph shall be void and unenforceable.

N.H. Rev. Stat. Ann. 358-A:10 (1993) (emphasis added). Defendant points to nothing in the statute that suggests that "any person" in either of these sections should be read to exclude commercial purchasers. Nor do they point to language that indicates that "commerce or trade" is restricted to commerce or trade involving ultimate consumers. The plain meaning of the statute clearly includes both retail and commercial transactions.

This construction is supported by the decisions of New Hampshire courts. The New Hampshire Supreme Court has recently observed:

> [T]he Consumer Protection Act "is a comprehensive statute designed to regulate business practices for consumer protection by making it unlawful for persons engaged in trade or commerce to use various methods of unfair competition and deceptive business practices." *Chase v. Dorais*, 122 N.H. 600, 601, 448 A.2d 390, 391 (1982). The very words contained in the statute indicate that the act's proscriptions are to be broadly applied.

Gilmore v. Bradgate Assoc., Inc., 604 A.2d 555, 557 (1992) (holding that although the condominium industry was regulated by a state authority, it was not exempt from the CPA under section 3 because, given the Act's expansive language, "the legislature . . . could [not] have intended to exclude from the protection of the act the large number of industries which are subject to regulation in this State simply because the legislature has provided

for regulation of that industry within a statutory framework." *Id.*). Since *Gilmore*, the issue of whether nonconsumer plaintiffs have a cause of action under the CPA has been raised in two New Hampshire courts and, in each instance, the Courts have held that the plain meaning of the statute and *Gilmore* do not require a plaintiff to be a consumer. *Christian Mutual Life Ins. Co. v. Kemper Securities Group*, 91-C-190 (Merrimack County Superior Court, Nov. 19, 1993); *A & B Electronics Co. v. Permagile Industries, Inc.*, 91-C-107 (Coos County Superior *499 Court Jan. 15, 1993).[3] While these cases are not controlling, the decisions of lower state courts are often the best indicator of how the high court will resolve an issue. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465, 87 S.Ct. 1776, 1782, 18 L.Ed.2d 886 (1967); *In re Brooklyn Navy Yard Asbestos Litigation*, 971 F.2d 831, 850 (2d Cir. 1992). Despite the plain language of the statute and the dearth of case law to support its proposition that the New Hampshire courts would adopt this narrow construction of the Act, Sherwin-Williams makes several other arguments in favor of this construction. We will address these arguments briefly.

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[3] Prior to *Gilmore*, the three courts which had considered the issue had not reached uniform decisions. *Bowman Business Forms, Inc. v. Bowman*, 87-E-0022-D (Merrimack County Superior Court Aug. 11, 1988) (358-A available to nonconsumer plaintiffs), *contra*, *International Corp. v. IDG Communications/Peterborough, Inc.*, No. 90-E-247 (Hillsborough County Superior Court August 27, 1990), and *Thermal Dynamics Corp. v. McGrath*, No. 88-C-090 (Grafton County Superior Court May 4, 1989) (nonconsumer plaintiffs did not have a cause of action under the CPA.) *International Corp.* was decided by Justice Kathleen McGuire who, in light of *Gilmore*, has since held that the CPA's provisions extend to actions between businesses in *Christian Mutual Life, supra.*

Federal judges considering the same issue have uniformly concluded the New Hampshire Supreme Court would construe the Act as applying to commercial transactions. *See, e.g., Nault's Automobile Sales, Inc. v. America Honda Motor Co., Acura Auto Div.*, 148 F.R.D. 25, 48 (D.N.H.1993); *Globe Distributors, Inc. v. Adolph Coors Co.*, 111 B.R. 377 (Bankr.D.N.H.1990).

Sherwin-Williams first argues that the New Hampshire Supreme Court's decision in *Chase v. Dorais*, 122 N.H. 600, 448 A.2d 390 (1982), supports its contention that the Consumer Protection Act is not as broad as it appears. In *Chase*, the New Hampshire Supreme Court held that no cause of action was available under chapter 358A when an individual, who was not in the business of selling used cars, sold a used car to another private individual. *Id.* at 391-92. This transaction was characterized by the Court as "strictly private in nature." *Id.* at 392. Because the sale in *Chase* did not take place in a "trade or business context" it was not in the course of "commerce or trade" as required by section 2 of the CPA. *Id.* Therefore, the CPA had no application. The decision in *Chase* did not turn on whether the transaction was a "consumer transaction" or a "commercial transaction" but on whether it was a "private transaction" or a "commercial transaction." Because the transaction between Sherwin-Williams and EMPT took place in the "trade or business context," *Chase* has no relevance to the issue at hand in this case.

Sherwin-Williams next argues that the CPA does not apply to purely commercial transactions because it is analogous to the Massachusetts Consumer Protection Act (Mass. Gen. L. ch. 93A, "chapter 93A"), but, unlike chapter 93A, has never been expressly amended to provide a cause of action for transactions between businesses. This argument is based on a myopic view of the history of the two acts. It is true that the New Hampshire Act is analogous in many regards to the Massachusetts Act, and that New Hampshire courts refer to Massachusetts case law where appropriate in construing the Act. *See Chase*, 448 A.2d at 291. However, Massachusetts authorities lose relevance when, as here, the New Hampshire legislature opted to enact different provisions from those set out in chapter 93A. The New Hampshire Act never included any counterpart to section 9 of chapter 93A which, prior to 1979, restricted the availability of a private right of action "to any person who purchases or leases goods, services or property . . . primarily for *personal, family or household purposes.*" The New Hampshire legislature did not adopt this restriction, opting instead for broad applicability in all commerce

and trade. Therefore, New Hampshire had no need to adopt an express provision to cover commercial transactions.

Because we find no ambiguity in the plain language of the statute, we need not consider the title of the Act in determining the correct construction. *See* 2A *Sutherland on Statutory Construction* § 47.03 (5th ed. 1992) (the title of a statute should be considered only when the language of the law is ambiguous). Even so, reference to the title "Regulation of Business Transactions for Consumer Protection" does nothing to shed doubt on our conclusion. The Act regulates "Business Transactions." It is clear from the facts of the case at hand that deceptive practices in the sale of inputs between a producer and a manufacturer can have significant impact on consumer welfare. This is particularly true where, as here, misrepresentations about such matters are likely to be discovered only after the final product begins to fail, creating costly and potentially dangerous situations for endline consumers.

Because the plain language of the statute encompasses the transaction at issue and Defendant points to no authority which would require this Court's deviation from the plain language of the statute, there is ample basis for the trial judge's determination to stand that the sale of the Sherwin-Williams paint system to EMPT was covered by the New Hampshire Consumer Protection Act.

II. Sherwin-Williams' Motion for Summary Judgment on the Basis of Failure to Show "Rascality" as a Necessary Predicate to Liability Under the Consumer Protection Act Claim.

We need not address the merits of this preverdict challenge to the sufficiency of the evidence on the motion for summary judgment. Such an attack on the denial of defendant's motion for summary judgment "has been overtaken by subsequent events, namely, a full-dress trial and an adverse jury verdict." *Lama v. Borras*, 16 F.3d at 476 n. 5. In such circumstances, we will not address the propriety of the denial of summary judgment where challenge is made on the basis of the insufficiency of evidence to

support the denial in the motion record. *Id.* and cases there collected. The rationale for this rule has been based on the procedural fact that a denial of a motion for summary judgment "is merely a judge's determination that genuine issues of material fact exist. It is not a judgment, and does not foreclose trial on issues on which summary judgment was sought." *Glaros v. H.H. Robertson Co.*, 797 F.2d at 1573. Hence, a challenge to the sufficiency of the evidence adduced on the motion to support the district court's conclusion that genuine issues of material fact exist will not lie on appeal.

We have reviewed the record with respect to the merits of this aspect of the Plaintiff's proposed challenge and are satisfied that no manifest error exists.

III. Defendant's Motion to Set Aside the Jury Verdict on the Consumer Protection Act Claim.

In Sherwin-Williams' motion to set aside the jury verdict, it contended that the judge erred in submitting the CPA claim to the jury for two reasons: (1) because the determination of violations of the Act was a matter for the judge, not the jury; and, (2) because it was impossible to ascertain what portion, if any, of the damages represented actual damages flowing from the CPA violation. The judge reviewed these contentions to determine whether the verdict was so clearly against the weight of the evidence as to constitute a manifest miscarriage of justice. *Kearns v. Keystone Shipping Co.*, 863 F.2d 177, 181 (1st Cir. 1988). Finding that the "clear and great weight of evidence" supported the jury verdict the judge denied the motion. Having reviewed the record, we find that Sherwin-Williams has waived these claims.

As for the argument that claims of violations under the CPA are for the judge alone to try, the district judge concluded that by failing to object to the submission of the CPA claim to the jury,

Sherwin-Williams had waived any objection.[4] The judge further noted that it was not inappropriate to submit factual issues to the jury, reserving the equitable issues under the CPA for the Court's determination. *Memorandum*, dated June 19, 1993, at 5. Because the objection to submitting the CPA claim to the jury was not raised below, and was not argued before this Court, we conclude that this objection was waived.[5]

As for the contention that the jury verdict must be set aside because it is impossible to ascertain what portion of the verdict represents damages flowing from the CPA violation, this ambiguity was the result of special jury questions to which Sherwin-Williams made no timely objection. Under Federal Rule of Civil Procedure 49(a), the parties agree to let the court resolve issues of fact not covered by special jury interrogatories unless an objection is raised before the jury retires. Rule 49(a) "ensures that, if submitted questions omit material issues of fact and no timely objection is lodged, the district court may itself make the findings which are necessary to cure the omission. . . . Curative findings are implied even when not expressly made." *Peckham v. Continental Casualty Insurance Co.*, 895 F.2d 830, 836 (1st Cir. 1990) (citation omitted). By failing to object to the damages interrogatory before the jury retired, Sherwin-Williams agreed to let the court determine this issue. Sherwin-Williams has not challenged the district court judge's determination that all damages flowed from the CPA violation, an implicit finding based

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[4] In fact, Sherwin-Williams submitted proposed jury instructions and special verdict forms which covered the claims under the CPA.

[5] On appeal Sherwin-Williams argues that the matter should not have gone to the jury because a jury verdict was precluded by the judge's findings on the motion for summary judgment on the fraud and bad faith claims. This point was not argued in the motion to set aside the verdict, nor did Sherwin-Williams raise this objection or seek a directed verdict on this basis. Accordingly, this argument was waived. Furthermore, as discussed in section two above, a CPA violation may be established where express or implied warranties are breached.

on the court's doubling of the damages. Therefore, the issue was waived.

IV. Plaintiff Misconduct as Defense to Warranty Claims.

Defendant's next assignment of error is that the district court judge erred in refusing to instruct the jury on "plaintiff misconduct" or comparative fault due to Plaintiff's alleged failure to use the vinyl wash primer or to test the paint system adequately before going into full production with Sherwin-Williams products. Defendant contends that principles of comparative fault apply under New Hampshire law to claims based on breach of warranty.[6] In support of this proposition, Sherwin-Williams relies on *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978). In *Thibault*, the Court gave judicial recognition to comparative fault in personal injury cases based on strict liability and breach of implied warranty of merchantability. *Id.* at 850. Plaintiff argued, and the district court agreed, that *Thibault* does not apply to all warranty cases but is limited to personal injury cases. Memorandum denying Sherwin-Williams' motion for a new trial, dated June 1, 1993, at 6. The district court judge further held that, even if he had erred in failing to give an instruction on Plaintiff's misconduct, the error was harmless because, in order to render its verdict, the jury had to determine that EMPT's reliance on Sherwin-Williams' recommendations was reasonable. *Memorandum* dated June 1, 1993, at 7. For the reasons that follow, we find that the district judge did

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[6] On appeal, Sherwin-Williams also argues that a comparative fault instruction should have been given with regard to the CPA. However, Sherwin-Williams never articulated the position that comparative fault was relevant to the CPA claim. Rather, in its motion for a new trial Sherwin-Williams' assignment of error was addressed only to the Court's refusal "to charge the jury and submit special interrogatories on the issue of 'plaintiff's conduct' (*i.e.* assumption of the risk) *with respect to its breach of warranty claims.*" Defendant's Motion for a New Trial on Liability and Damages, ¶ 3 (emphasis added). Accordingly, we find that Sherwin-Williams has waived the issue of the application of comparative fault principles under the CPA.

not err in refusing to give an instruction based on "plaintiff's misconduct."

First, we agree that the holding in *Thibault* does not presage the general extension of notions of comparative fault to all breach of warranty cases. *Thibault* was decided to bring recovery rules in cases based on strict liability in tort into line with statutory recovery rules governing tort cases based on negligence. *Id.* Sherwin-Williams has not cited, nor have we found, any New Hampshire case which applies comparative fault in warranty cases except in personal injury cases based on dual theories of strict liability in tort and breach of an the implied warranty of merchantability. N.H. Rev. Stat. Ann. 382-A:2-314 (1993).

Thibault does not address the availability of such a defense to override either an express warranty or an implied warranty of fitness for a specific purpose under the New Hampshire Uniform Commercial Code ("NHUCC"). N.H. Rev. Stat. Ann. §§ 382-A:2-213, 2-315. These provisions govern the creation of specific warranties between the buyer and seller of goods. Under NHUCC, such warranties may be excluded or modified only (a) in writing, or (b) under specific circumstances.[7] N.H. Rev. Stat. Ann. 382-A:2-316 (1993). We do not believe that the New

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[7] One such circumstance which has the effect of limiting implied warranties is when a buyer examines, or has the opportunity to examine, a product and, despite defects that the buyer discovered or should have discovered, enters into a contract to purchase goods. *See* N.H. Rev. Stat. Ann. 382-A:2-316(3)(b) (1993). However, the buyer is not responsible for discovering latent defects. *Id.* Here, it is undisputed that early inspection of the first deck painted using Sherwin-Williams products did not reveal the defects which caused the failure of the paint system within the first season in use.

More important, inspection and testing does not negate an express warranty. *See General Electric Co. v. United States Dynamics, Inc.*, 403 F.2d 933, 935 (1st Cir. 1968) (holding that under identical provisions of the Massachusetts Uniform Commercial Code "inspection [under section 2-316(3)(b)] could not offset express warranties").

Hampshire Supreme Court, in crafting a judicial rule of recovery governing strict liability in tort cases, had any intention of altering the comprehensive statutory provisions of the NHUCC governing sales contracts.

Furthermore, even if the concept of comparative fault were available as a defense to a claim based on breach of warranty in a contract case, Sherwin-Williams has not alleged anything amounting to "plaintiff misconduct" on EMPT's part. The New Hampshire Supreme Court has defined "plaintiff's misconduct" as "product misuse or abnormal use, as well as embodying the 'negligence' or 'assumption of the risk' concepts in our prior cases of voluntarily and unreasonably proceeding to encounter a known danger." *Thibault*, 395 A.2d at 849. Defendant has not alleged that Plaintiff either misused the products or "voluntarily and unreasonably proceed[ed] to encounter a known danger." The uncontroverted evidence at trial established that EMPT used the products in accordance with Sherwin-Williams' recommendations and that such use was supervised by a Sherwin-Williams representative who observed each phase of the application process. After the first deck was completed, there was no indication that the paint system was not suitable for EMPT's purpose. Thus, there is no evidence that EMPT "misused" the paints, put the paints to abnormal use, or that it knowingly and unreasonably proceeded to encounter a *known danger*. Accordingly, Sherwin-Williams was not entitled to an instruction on Plaintiff's misconduct.

V. Denial of Motion for New Trial on Damages and Remittitur.

The trial judge denied Sherwin-Williams' motion for a new trial or remittitur, concluding that the damages awarded were based on a rational appraisal of the damages. In reviewing an award of damages, the district court is obliged to review the evidence in the light most favorable to the prevailing party and to grant remittitur or a new trial on damages only when the award "exceeds any rational appraisal or estimate of the damages that could be based upon the evidence before it." *Kolb v. Goldring, Inc.*, 694 F.2d

869, 872 (1st Cir. 1982). Under New Hampshire law a jury award of damages may be set aside only if it is "conclusively against the weight of the evidence." *Panas v. Harakis*, 129 N.H. 591, 529 A.2d 976, 983 (1987). This standard "should be interpreted to mean that the verdict was one no reasonable jury could return." *Id.* Where an award of future lost profits is at issue, the verdict will be upheld if there is sufficient data to indicate that profits were reasonably certain to result. *Petrie-Clemons v. Butterfield*, 122 N.H. 120, 441 A.2d 1167, 1171 (1982). This is so even if a business posted losses every year that it operated. *Restaurant Operators, Inc. v. Jenney*, 128 N.H. 708, 519 A.2d 256, 260 (1986) (upholding award of future lost profits based on uncontradicted evidence that business "had reached the break-even point and gave every prospect of continued growth.").

In this case, the record indicates that EMPT was at a break-even point and had shown strong growth for six years preceding the paint failure. There was testimony that the cost of repairing the decks covered with Sherwin-Williams paint would be approximately $267,000. Lost profits to the date of trial were $383,000 based on Plaintiff's expert's testimony that EMPT had shown an approximate growth rate of 15% and a profit margin of 23% on each deck. EMPT had recently constructed a new factory and hired additional employees and, therefore, had the capacity to maintain this growth rate into the future. There was further testimony that it would take Mr. Rogers approximately three years to rebuild the business. The jury awarded EMPT a total of $1,087,000, an award that apparently includes $437,000 in lost future profits.[8]

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[8] The instruction on lost profits covered both past profits and future lost profits as follows:

> Loss of profits may be recovered as consequential damages if the plaintiff proves that it was more probable than not that the business profits sought to be recovered were reasonably foreseeable by the defendant when the contract was entered, reasonably ascertainable,

In its motion, Sherwin-Williams contended that there was no evidence to support the award of lost profits and that, therefore, the jury award is speculative. The trial judge, who had the benefit of hearing the testimony and observing the witnesses, denied this motion, finding that "the jury's verdict is well supported up to the point that it awarded $650,000" in repair costs and past lost profits. The district court found that an award of future lost profits was also supported by a rational appraisal of the evidence.

> The jury could also award a higher figure because there was sufficient evidence for the jury to determine future lost profits. . . . The evidence produced concerning future lost profits was not precise, but it was sufficient to enable the jury to project and calculate beyond the $650,000 amount. For example, Plaintiff's expert, Mr. Hughes testified that the business had gotten to the stage where the fixed costs were covered so that every additional sale went to the bottom line; therefore, the profits from additional sales go directly to net profit. In addition to this, Mr. Rogers testified that it would take three years to rebuild the business, . . . and Messrs. Rogers, Hughes, Crabtree, and Liddy all testified that the business was generally not affected by the fluctuations in the economy and that the business continued to grow on a yearly basis. The evidence was, therefore, sufficient to support an award of future lost profits in the amount of $437,000.

Memorandum, dated June 1, 1993, at 10-11. Having reviewed the record, we cannot say that the district court erred in concluding that the jury's damage award was supported by the evidence.

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and were reasonably certain to result based upon the relevant data presented to you as evidence in this case.

Future lost profits do not have to be proven with absolute certainty but the plaintiff must produce sufficient evidence to demonstrate some profits were otherwise reasonably certain to result. As stated above, you may not award damages that are merely speculative.

VI. The Judge's Conduct During Trial.

In its brief, Sherwin-Williams points to two statements made by the judge during the course of the trial which, it contends, irreversibly prejudiced the process and constituted judicial misconduct. In order to sustain this charge, this court must find that "a party was so seriously prejudiced as to be deprived of a fair trial. . . . in light of the entire transcript." *Aggarwal v. Ponce School of Medicine*, 837 F.2d 17, 22 (1st Cir. 1988) (citing *Crowe v. Di Manno*, 225 F.2d 652, 659 (1st Cir. 1955); *Glasser v. United States*, 315 U.S. 60, 83, 62 S.Ct. 457, 470-71, 86 L.Ed. 680 (1942)).

Here, Defendant contends that two statements by the judge to the effect that the "only issue" or "sole issue" in the case was whether or not the Sherwin-Williams paint had failed had prejudiced Sherwin-Williams to the extent of depriving it of a fair trial. Taken out of context, the statements appear improper. However, viewed in context, the statements related only to the relevancy of comparisons of product specifications which were both confusing and cumulative. Moreover, in both instances, the judge permitted the Defendant's attorneys to proceed with their questions relating to these specifications. In light of the jury instructions at the beginning of the trial explaining the proper role of judge and jury, and the instructions at the end of the trial outlining the many factual issues to be decided by the jury, we do not believe these isolated statements had the effect of removing issues from the jury and depriving Sherwin-Williams of a fair trial.

VII. Sherwin-Williams' Objections to the Award of Prejudgment Interest.

Sherwin-Williams is correct in its challenge to the award of prejudgment interest from the date of the jury verdict to that of the final judgment. The New Hampshire legislature has provided for prejudgment interest in cases "in which a verdict is rendered or a finding is made for pecuniary damages to any party . . . from the date of the writ or the filing of the petition *to the date of such verdict or finding*." N.H. Rev. Stat. Ann. § 524:1-b

(1993). The plain language of the statute indicates that the award of prejudgment interest should be granted to the date of the verdict or finding. Although Plaintiffs contend that the word "finding" should be interpreted to mean a "final judgment," there can be no doubt, in light of the history of the statute, that this was not the legislature's intention. The history of the statute reveals that in 1969, the provision was rephrased and the words "verdict or finding" were substituted for "entry of final judgment." Accordingly, we conclude that EMPT was entitled to prejudgment interest only up to January 12, 1993, the date of the verdict in this case, and we remand for a recalculation of prejudgment interest and entry of final judgment in accordance therewith.

Defendant's second argument, that the award of prejudgment interest on future lost profits was improper, has been waived. Sherwin-Williams never raised the issue of prejudgment interest on future lost profits—objecting only to the award of such interest on the "punitive" portion of the judgment.[9] Moreover, Sherwin-Williams' request for relief was for the district court to "calculate the award of pre-judgment interest based on the amount of the jury's verdict of $1,087,000." Defendants' Objection to Plaintiff's Amended Motion for Pre-Judgment Interest. Accordingly, Sherwin-Williams has waived any objection to the award of prejudgment interest on future lost profits.

VIII. EMPT's Objection to the Award of Prejudgment Interest.

EMPT cross-appeals claiming that the trial judge erred in denying its request for prejudgment interest on the full amount of the judgment after the judge doubled the jury award pursuant to section 10 of the CPA. The district court judge denied the request for prejudgment interest based on the purpose of section 524:1-b, which is to compensate the plaintiff for loss of use of the

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[9] The jury was instructed that damages were available to compensate plaintiff for (a) the cost of repairs, and (b) lost profits. We are satisfied that, based on these instructions, the jury verdict included only pecuniary damages.

money it should have had. *See Lakin v. Daniel Marr & Son, Co.*, 732 F.2d 233, 238 (1st Cir. 1984). Noting, in particular, that the statute provides for prejudgment interest on "pecuniary damages," we agree that the judge did not err in refusing to award prejudgment interest on the doubled award.

CONCLUSION

The decision below is *remanded* for recalculation of prejudgment interest from the date of filing to the date of the jury verdict. In all other regards, the district courts rulings and judgment are *affirmed*.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

Nos. 94-1044 & 94-1045

EASTERN MOUNTAIN PLATFORM TENNIS, INC.,

Plaintiff, Appellant,

v.

SHERWIN-WILLIAMS COMPANY, INC.,

Defendant, Appellee.

ORDER OF THE COURT

Torruella, *Chief Judge*,
Campbell, *Senior Circuit Judge*,
Carter,* *District Court Judge*,

Entered: January 6, 1995

Upon consideration of appellant's motion for rehearing and request to certify question of law,

It is ordered that the petition for rehearing and the request to certify a question of law be both denied.

/s/ Francis P. Scigliano
FRANCIS P. SCIGLIANO, Clerk

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* Of the District of Maine, sitting by designation

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Civil Action No. 1:91-CV-128-B

THOMAS T. ROGERS, Individually
and
EASTERN MOUNTAIN PLATFORM TENNIS

v.

THE SHERWIN-WILLIAMS CO.

ORDER

AND NOW, this 5th day of January, 1993, upon consideration of Defendant's Motion For Summary Judgment On Eastern Mountain's Consumer Protection Act Claim, and the response thereto, it is hereby ORDERED that said motion is DENIED.

With regards to a summary judgment motion, the moving party has the burden of demonstrating that there is no dispute as to any material fact and that it is entitled to judgment as a matter of law. *See Mesnick v. General Electric Co.*, 950 F.2d 816, 822 (1st Cir. 1991) (applying Federal Rule of Civil Procedure 56(c)). Instantly there is no dispute that both parties are businesses. The issue is whether the parties are "persons" under the New Hampshire Consumer Protection Act, RSA 358-A. It is noted that much of New Hampshire's Consumer Protection Act was modeled after the Massachusetts Consumer Protection Statute which was amended in 1973 to cover transactions between businesses. Notwithstanding the fact that New Hampshire has not enacted a similar amendment, the plain language of the statute states that "persons" under the Act shall include, *inter alia*, corporations and any other legal entity. Without a clear indication that businesses are not persons under the Act, the plain language would include businesses as persons. In addition, in *Concord Labs, Inc. v.*

Ballard Medical Products, 701 F. Supp. 272 (D. N.H. 1988) and *In re Globe Distributors, Inc.*, 129 B.R. 304 (1991) the New Hampshire Consumer Protection Act was applied among businesses.

Finally, in *Chase v. Dorais*, 448 A.2d 390, 391-92 (N.H. 1982), the New Hampshire Supreme Court looked to the Massachusetts Supreme Court's interpretation of "trade and commerce" as a point of reference in deciding that the Consumer Protection Act applies "broadly and expansively" to business transactions in New Hampshire. Defendant argues that the Act applies as between businesses in Massachusetts because of the 1972 amendment, and because New Hampshire has not adopted such an amendment, the Act does not apply as between businesses in New Hampshire. If an Act is to be applied broadly and expansively to business transactions, it would be inconsistent to then interpret the Act to not apply as between a transaction between two business. Accordingly, defendant's motion is DENIED.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.
(sitting by designation)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 91-CV-128-B

EASTERN MOUNTAIN PLATFORM TENNIS,
PLAINTIFF,
v.

THE SHERWIN-WILLIAMS COMPANY,
DEFENDANT.

ORDER

AND NOW, this 1st day of June, upon consideration of 1) Defendant's Motion to Set Aside Jury Verdict Regarding Consumer Protection Act Claim, 2) Defendant's Motion for a New Trial on Liability and Damages, and 3) Defendant's Motion for a New Trial, or in the Alternative, for Remittitur, and plaintiff's objections thereto, and consistent with the foregoing Memorandum Opinion, it is hereby ORDERED that said motions are DENIED.

IT IS FURTHER ORDERED, that pursuant to the Consumer Protection Act, the jury's award of $1,087,000 is hereby DOUBLED and JUDGMENT IS ENTERED in favor of the plaintiff for a total of $2,174,000.

AND IT IS SO ORDERED.

/s/ Clarence C. Newcomer, J.
Clarence C. Newcomer, J.
(sitting by designation)

June 1, 1993

Aug. 2, 1993
FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

EASTERN MOUNTAIN
PLATFORM TENNIS, Civil Action

v.

THE SHERWIN-WILLIAMS
COMPANY, No. 91-CV-128-B

ORDER

AND NOW, this 2nd day of August 1993, pursuant to RSA 358-A:10, and consistent with the foregoing Memorandum, it is hereby ORDERED that plaintiff is AWARDED $111,280.27 in Reasonable Attorneys' Fees.

AND IT IS SO ORDERED.

/s/ Clarence C. Newcomer
Clarence C. Newcomer, J.
(sitting by designation)